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Ocned Water Technology Sdn Bhd v Cypark Sdn Bhd

B

HIGH COURT (SHAH ALAM) — SUIT NO 22C-22–09 OF 2014
SEE MEE CHUN J
28 APRIL 2016

C

Contract — Building contract — Claim for payment for work done under subcontract — Interim progress claims made — Non-payment of claim No 12 — Whether claim superseded by later interim progress claim — Delay — Whether delay had effect on plaintiff's claim — Counterclaim — Liquidated and ascertained damages — Whether there was proof of actual loss suffered by the defendant

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By way of a letter of award ('LOA') the defendant had appointed the plaintiff as its subcontractor to undertake the construction of an aeration tank structure and other ancillary components as specified by the defendant. On 31 October 2012, the defendant had terminated the LOA for alleged breaches by the plaintiff. The plaintiff filed the present claim for the payment of the balance sum of RM1,336,262.11 for work done under the LOA. This claim was premised on the plaintiff's interim progress claim No 12, which was issued after a joint inspection of the work site on 25 October 2012. It was not disputed that there was a joint inspection and joint certification of the work, which was attended by the plaintiff's representative and the defendant's consultants. The essence of the defendant's resistance to the plaintiff's progress claim No 12 was that the assessment that was carried out at the work site was not final. According to the defendant any form of certification of the rate of progress of the work done at this point was only a rough estimate of the percentage of work completed and thus not final. The defendant submitted that the fact plaintiff that the plaintiff had proceeded to issue progress claim No 13 showed that the claim No 12 was not final. Thus the defendant refuted the amount being claimed by the plaintiff and counterclaimed, inter alia, for the value of the remaining work not completed and liquidated and ascertained damages ('LAD').

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Held, allowing the plaintiff's claim of RM1,160,695 with interest and costs and dismissing the defendant's counterclaim:

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(1) The defendant's contention that progress claim No 12 could not be relied on because of the subsequent progress claim No 13 did not hold as the plaintiff had given cogent reasons for the circumstances under which the claim No 13 was issued. The plaintiff's managing director had explained that claim No 12 had not been superseded by claim No 13 and that it had

only come about because the defendant had wanted a discounted price. Since there had been no payment even after the discount, the plaintiff went back to claim No 12 to base its claim in this present case. In the circumstances, the plaintiff was entitled to be paid on progress claim No 12 (see paras 29–30).

(2) The fact of delay did not have an effect on the plaintiff's claim that was premised on progress claim No 12, which was for work done and materials supplied as at the date of termination of the LOA. In the case the defendant was entitled to a deduct a sum of RM158,122.70 for excessive claims but not any deductions for direct payments because it had not proved this payment in the form of invoices payment vouchers and or receipts (see paras 31 & 35).

(3) In relation to the defendant's claim of RM560,000 for LAD, it was clear from the facts of the case that this was not the actual loss suffered by the defendant. Further, there was no proof of any LAD imposed on the defendant by its the employer (see para 80).

[Bahasa Malaysia summary

Melalui surat award ('SA') defendan telah melantik plaintif sebagai subkontraktor untuk menjalankan pembinaan struktur tangki pengudaraan dan komponen sampingan yang lain seperti yang ditetapkan oleh defendan. Pada 31 Oktober 2012, defendan telah menamatkan SA kerana kemungkiran oleh plaintif. Plaintif memfailkan tuntutan ini bagi bayaran baki bayaran sebanyak RM1,336,262.11 bagi kerja yang siap di bawah SA. Tuntutan ini adalah berdasarkan atas tuntutan kemajuan plaintif No 12, yang mana dikeluarkan selepas pemeriksaan bersama tapak kerja pada 25 Oktober 2012. Ia tidak dapat dipertikaikan bahawa terdapat pemeriksaan bersama dan sijil bersama kerja, yang mana dilakukan oleh wakil plaintif dan pakar perunding defendan. Intipati tentangan defendan kepada tuntutan kemajuan plaintif No 12 adalah bahawa penilaian yang dijalankan di tapak kerja bukanlah muktamad. Mengikut defendan apa-apa bentuk pengesahan mengenai kadar kemajuan kerja yang dijalankan pada poin ini hanya anggaran kasar terhadap peratusan kerja yang siap dan oleh itu bukan muktamad. Defendan berhujah bahawa fakta bahawa plaintif telah terus mengeluarkan tuntutan kemajuan No 13 menunjukkan bahawa tuntutan No 12 bukan muktamad. Oleh itu, defendan menyangkal jumlah yang dituntut oleh plaintif dan menuntut balas, antara lain, bagi nilai kerja yang tinggal yang tidak siap dan ganti rugi tertentu dan ditetapkan ('LAD').

Diputuskan, membenarkan tuntutan plaintif sebanyak RM1,160,695 dengan faedah dan kos dan menolak tuntutan balas defendan:

(1) Hujahan defendan bahawa tuntutan kemajuan No 12 tidak boleh digunakan kerana tuntutan kemajuan No 13 seterusnya tidak boleh

digunakan kerana plaintif telah memberi alasan meyakinkan bagi keadaan di mana tuntutan No 13 dikeluarkan. Pengarah urusan plaintif telah menjelaskan bahawa tuntutan No 12 tidak digantikan oleh tuntutan No 13 dan bahawa ia hanya berbangkit kerana defendan mengkehendaki harga yang dikurangkan. Memandangkan tidak terdapat bayaran walaupun selepas diskaun, plaintif beralih kembali kepada tuntutan No 12 untuk mendasarkan tuntutannya dalam kes ini. Dalam keadaan ini, plaintif berhak dibayar atas tuntutan kemajuan No 12 (lihat perenggan 29–30).

(2) Fakta kelewatan tidak mempunyai kesan ke atas tuntutan plaintif yang berdasarkan atas tuntutan kemajuan No 12, yang mana adalah untuk kerja yang telah dilakukan dan bahan yang dibekalkan pada masa tarikh penamatan SA tersebut. Walau bagaimanapun defendan berhak untuk menolak jumlah sebanyak RM158,122.70 bagi tuntutan berlebihan tetapi bukan apa-apa penolakan bagi bayaran terus kerana ia tidak meluluskan bayaran ini dalam bentuk baucar bayaran invois dan atau resit (lihat perenggan 31 & 35).

(3) Berkaitan tuntutan defendan sebanyak RM560,000 bagi LAD, ia adalah jelas daripada fakta kes bahawa ini bukan kerugian sebenar yang dialami oleh defendan. Selanjutnya, tidak terdapat bukti mengenai apa-apa LAD yang dikenakan ke atas defendan oleh majikannya (lihat perenggan 80).]

Notes

For cases on building contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3869–4135.

Cases referred to

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)

Jasmeetpal Singh (Siew & Jasmeet) for the plaintiff.
Andrew Heng (Roger Leong with him) (Zain Megat & Murad) for the defendant.

See Mee Chun J:

PARTIES AND CLAIM

[1] By letter of award dated 25 October 2011 (LA B 22–379) the defendant had appointed the plaintiff as its subcontractor to undertake civil, structural, mechanical and electrical work (including testing and commissioning) in relation to a leachate treatment plant at Jabor, Pahang ('work'). The employer is the Government of Malaysia ('GOM'). LA was terminated on 31 October 2012 due to alleged breaches by the plaintiff. This is the plaintiff's claim for

work done for a balance of RM1,336,262.11. The defendant counterclaims, inter alia, for value of remaining work not completed and liquidated and ascertained damages ('LAD').

[2] Witness for the plaintiff was Mr Tan Soo Huang aka Dennis, managing director (PW1 and witness statement marked as WSP1). Witnesses for the defendant were Mr Jamil bin Sekam, construction manager (DW1 and witness statement marked as WSD2) and Ms Ong Ee Me aka Amy, contract manager (DW2 and witness statement marked as WSD2 and WSD2A).

THE PLAINTIFF'S CLAIM — INTERIM PROGRESS CLAIM NO 12

[3] With regard to the plaintiff's claim it is premised on its interim progress claim No 12. Accordingly the evidence of the witnesses on this will be set forth.

Evidence of PW1

[4] PW1 explained in his examination-in-chief the plaintiff's scope of work was to build an aeration tank structure and other ancilliary components and to supply and install equipment and instrumentation as specified by the defendant and to build a TNB sub-station. According to PW1 the amount due and owing of RM1,336,262.11 from the defendant excludes the retention sum of RM280,558.01 which is still held by the defendant. This is the amount due after taking into account the value of the works done and the value of the materials supplied by the plaintiff less the total payments made by the defendant and less sums debited and retained by the defendant. The combined value of the works done and materials supplied by the plaintiff is RM3,874,594.37. This value of RM3,874,594.37 is arrived with reference to the plaintiff interim progress claim No 11 (B1 492–549) for the period ending 25 October 2012 submitted to the defendant. This was the claim issued immediately prior to termination.

[5] On 1 November 12 there was a joint inspection by the plaintiff and the defendant where there were changes made. The defendant had used this interim progress claim No 11 to check the percentage of works done and the value of materials supplied. The items that the defendant agreed to and accepted as correct, it ticked on this progress claim. Then there were some items which the defendant changed in terms of the percentage of works done. These changes were done in writing by the defendant by cancelling the percentage shown in interim claim No 11 and substituting its assessment of percentage of work done. These changes in writing by the defendant can be seen at B1 495–498, 501, 503, 505, 508–510 and 514. Arising therefrom the defendant's assessment of value of work done was RM3,576,111.12 and value of materials supplied was RM298,483.25 making it a total of RM3,874,594.37. As this

amount was from the defendant and in order to receive payment the plaintiff accepted it and issued its interim progress claim No 12 as in B1 550–578. After taking into account the amount paid by the defendant of RM2,243,687.26 what is due to the plaintiff is RM1,336,262.11. This is arrived as follows:

(a) value of works done and value of material supplied by the plaintiff	: RM3,874,595.37
(b) amount paid to the plaintiff	: RM2,243,687.26
(c) balance sum	: RM1,630,907.11
Less :	
(d) retention sum	: RM280,558.01
(e) debit note sum	: RM14,086.99
Amount now due and payable	: RM1,336,262.11

[6] In cross-examination PW1 stated the basis of his claim was in interim progress claim No 11 and the joint inspection. There were seven signatures on the joint inspection of which two were his staff and his signature is not there. He was not present at the joint inspection. It was suggested to him as he is not present at joint inspection and if what he is told by his staff is inaccurate his evidence the joint inspection agreed and accepted the rate of progress of work would be inaccurate, he said he didn't think so as they had discussed at the office before going to site. He agreed he cannot be sure what his staff tells him but added joint inspection was witnessed by seven people. As to why if parties had agreed on the amount the plaintiff did not make any claim, PW1 referred to the interim progress claim No 12.

[7] He agreed that what was claimed in interim progress claim No 12 is not exactly the same as per joint inspection. Then followed a series of questions and answers:

> 83Q: Now, can I invite you back to Progress Claim No 11, at p 491. From p 491, all the way to p 514, Mr Tan would see an endorsement at the bottom right which says, 'The proposed percentage completion is subject to final approval from client PPSPPA and Consultants'. Do you see that?
>
> A: Yes.
>
> 84Q: Mr Tan do you agree with me that that means whatever that has been assessed on the 1 November 2012 is not final because number 1, it is an merely proposed percentage, agree?
>
> A: Yes.
>
> 85Q: Number 2, it is subject to final acceptance from the client PPSPPA and Consultants, in reference to the defendant's client, correct?
>
> A: Yes. (Page 23 NOP)

95Q: ... But you agree with me that if the employer does not accept the assessment here, then whatever that is written here would not be valid as per parties' agreement, correct?

A: That's the reason why they ask us to submit again.

96Q: Maybe you can answer my question first?

A: Yes agreed.

97Q: You said that is why they asked to submit ...

A: No, when we submit No 12, they reject it, they ask us to re-assess again and give them another figure. (Page 26 NOP)

100Q: ... The claim today is based on what was assessed on the joint inspection on 1 November, correct?

A: Correct.

101Q: And we have established that if that assessment is not accepted by the employer, then as per parties agreement, whatever assessed could not be valid, correct?

A: Correct.

102Q: ... by saying that my client asked you to submit further claim, clearly that the employer did not accept the assessment, would that be correct?

A: Correct. (Page 27 NOP)

[8] PW1 was next referred to GOM's payment certificate No 25 (B6 3382 onwards) and based on the date of valuation of 9 November 2012 agreed this is the closest and most accurate assessment from the time the plaintiff was terminated. He agreed too that whatever certified would represent what the employer has accepted of the work carried out by the plaintiff as subcontractor. At B6 3475, he was referred to the column 'current' he agreed nothing was certified and said this is between the client. It was then put to him that whatever was assessed on 1 November 2012 was not accepted as otherwise it would be reflected as current work to which he disagreed. He agreed a simple method to determine whether the progress rate has been agreed by the employer is to look at overall percentage and this would be whatever completed work claimed divided against full contract sum multiplied by 100%. He agreed based on interim progress claim No 12 the plaintiff would have completed 69.18%. He agreed that the defendant's assessment based on interim progress claim No 13 the completion is 50.19% and on GOM's payment certificate No 25 the completion is 42.88%. He disagreed that based on these percentage the proposed percentage of completion during joint inspection was rejected by the employer and said 'the defendant didn't even claim', 'I claim but they may not claim' (p 38 NOP). As to whether all assessment of claim must be done at site he replied 'Yes, that is between me and the defendant'.

[9] The following was next asked:

151Q: In other words, if something was constructed there by the Plaintiff, that would have been recognised by the employer during the assessment on the 9 November, correct?

A: I did not have any opportunity to deal with the employer. We only dealt with the defendant.

152Q: No no, from your experience, my client ...

A: Yes, possible.

154Q: ... that there is no merit to say that whatever done was not claimed simply because during the assessment on the 9 of November, which has to be at site, the employer can see for themselves, what was done and what was not done. You can agree or disagree?

A: Disagree. (Page 39 and 40 NOP)

[10] PW1 was then referred to B6 3243–3270 which is claim No 13 the final claim. He agreed the amount total work done in claim No 13 is lesser than claim No 12 and this is due to the defendant 'not agree and arm twisting us to submit another one which they agreed saying that the reduction is mainly on T&C ... we have done all the equipment T&C at the factory before we delivered'. On there being no evidence of arm twisting he said 'otherwise there is no reason for claim No 13 to come in'. He agreed by submitting the claim amount in claim No 13, claim amount in claim No 12 is no longer relevant.

[11] PW1 was next posed these questions:

180Q: Now, in totality of these, we have gone so far from joint inspection to agreement, to what was accepted, to submission of Claim No 12,to then the different amount in Claim No.13, all these claims show only one thing, and I respectfully suggest to you that whatever happened on the 1 of November 2012 claim was not meant to be a final assessment of work done?

A: Yes.

181Q: And number 2, that renders, whatever agreed upon purportedly, on the 1 November to be wholly irrelevant, do you agree?

A: No.

182Q: And to wrap up, I will respectfully suggest to you, all you have before this court today, are merely your Claim No 13, correct? It is merely a claim, it is a Claim No 13?

A: With the certificate 8, 9, 10 also. (Page 46 NOP)

207Q: So now, are you challenging or not challenging the certification?

A: I don't agree with the figure.

208Q: ... from the very beginning my question was, Claim No 1 is merely a claim, it is not supported by anything, you said no, it was supported by my client's own

certification, so I asked for those certification and you pointed it out to me, then I asked you, do you challenge the amount certified here, which you said, you do not. Then ...

A: But the certificate No 13, is the accumulation of 8, 9 and 10.

(Page 53 NOP)

[12] In re-examination PW1 explained progress claim No 12 was not exactly the same as the joint inspection. He clarified the following:

417Q: You had Progress Claim No 11, which was then used for the purposes of the joint inspection on the 1 of November 2011. Now you say, pursuant to that joint inspection, there was culminated in your Claim No 12 which was submitted to the plaintiff. Now, since there was Claim No 12, which was the result of the joint inspection, why then was Claim No 13 issued and submitted to the defendant?

A: When we submit No 12, they outright rejected it and asked us to use a figure and promised that they would pay us after we do not adjustment to reduce. So, as far as I am concerned, if they can pay me, then I don't mind to give the discounted price but they failed to pay us on the 13 that we discounted for them even though they promised to pay us. Until today they did not even give a certificate.

418Q: Now, you also agreed to a question by my learned friend counsel for the defendant that by submitting Claim No 13, Claim No 12 was no longer relevant and had been superseded by Claim No 13. Can you explain that?

A: I don't agree now because the Claim No 13 come about because they are arm-twisting us, because they say you have to go to change it before I can certify and pay you, otherwise they don't even want to pay us. So I have to change it. But now since they didn't keep to the promise to pay us, I will go back to Claim No 12 as my claim. Because 12 is a joint inspection.

419Q: So now your claim based on 12 or 13?

A: On the 12. (Page 111–112 NOP)

[13] On the defendant certificates Nos 8, 9 and 10, they form part of the accumulation of the claim. Aside from LAD the plaintiff disputed the defendant not putting any progress at all because the figure was almost the same.

Evidence of DW1

[14] It was DW1's evidence-in-chief the normal process was for the plaintiff's claims to be preliminarily assessed by him or the defendant's staff at the work site before it could be submitted to DW2 for her further action. He wrote the endorsement with the words 'The proposed percentage completion is subjected to final approval from client, PPSPPA and consultants' at B1 491–514 which is in regard to the plaintiff's interim progress claim No 11. Prior to this he had not written such endorsement. This endorsement was made

after the joint inspection. At Q&A 15 he stated:

> ... Saya bimbang sekiranya saya tidak membuat pengendorsan tersebut berikutan lawatan saya, plaintif akan menggunakan pengendorsan tersebut berikutan lawatan saya, plaintif akan menggunakannya dan mendakwa bahawa apa- apa pemeriksaan pendahuluan saya terhadap peratusan kerja di dalamnya merupakan satu pengesahan bersama di antara kedua-dua pihak plaintif dan defendan walaupun proses pemeriksaan secara pendahuluan ini memang merupakan proses biasa untuk kesemua tuntutan sebelumnya.

[15] He refuted the plaintiff's allegation there had been a joint assessment of value of work and materials supplied of RM3,874,594.37. This was because of the standard operating procedure which required preliminary assessment of claims by him or the defendant staff before being forwarded to DW2. This preliminary assessment was not intended to be final.

[16] In cross-examination he stated he wrote the endorsement as this was a preliminary assessment before progress claim No 11 could be submitted to the defendant's contract department and this meant it was not final. This was done on 1 November 2012. At B1 491–514 he signed where the words 'CYP' ('for Cypark') appeared. At B1 495 and subsequent pages he had done 'pemotongan pada kadar'. The asterisk with the words 'Ocned to justified to CYP on the scope of works on T&C' was written by him. He then stated the endorsement on each page had been written by the engineer on his instruction and this was done on the day of joint inspection. The signatories to B1 492–514 were representatives from the defendant's consultant, the defendant's quantity surveyor ('QS') and two representatives from the plaintiff. He agreed the parties had physically attended site on 1 November 2012 for the joint inspection which was based on interim progress claim No 11. From the joint inspection items were ticked and changed as at B1 495. Prior to interim progress claim No 11 he was the only one doing preliminary assessment. He then said the following:

> 76Q: Kamu kata sebelum daripda Interim Progress Claim No 11 ini, kamu seorang sahaja wakil dari pihak defendan yang akan lakukan pemeriksaan pendahuluan?
>
> A: Ya.
>
> 77Q: Setuju tak kalau saya katakan kepada kamu bahawa pemeriksaan pendahuluan bagi No 11 ini, memandangkan ianya dihadiri dan dilakukan oleh sebilangan enam orang, enam wakil daripada kedua-dua pihak, ini merupakan, pemeriksaan pendahuluan ini bersifat seperti tuntutan akhir atau tuntutan penutup selepas peamatan kontrak dengan plaintif. Betul?
>
> A: Betul.
>
> 78Q: Dan kerana ianya telah dilakukan, pemeriksaan ini telah dilakukan selepas penamatan kontrak dengan plaintif, ianya bukanlah seperti pemeriksaan pendahuluan yang sebelumnya. Betul?

A: Betul.

79Q: Setuju tak En Jamil, kalau saya katakan bahawa pemeriksaan ini telah dilakukan selepas penamatan kontrak plaintif untuk mempastikan tahap kerja dan nilai barangan yang telah dibekalkan oleh plaintif setakat tarikh penamatan. Betul?

A: Betul.

80Q: Dan kerana ini bukanlah satu pemeriksaan pendahuluan yang biasa seperti sebelumnya, sebab itulah seramai 6 orang telah hadir termasuk perunding-perunding defendan. Betul?

A: Betul.

83Q: Setuju tak sebab ada enam orang termasuk consultant, lepas penamatan dan kamu kata juga besifat seperti tuntutan terakhir atau tuntutan penutup, jadi hasil pemeriksaan apa yang kamu tick, apa yang kamu betulkan dan sebaginya mencerminkan tahap kerja dan barangan yang dibekalkan oleh plaintif dengan tepat dan jelas dan teliti?

A: Betul. (Page 136 and 137 NOP)

[17] A QS by the name of Zakaria was also present as the representative from contract department. As to whether the plaintiff's submitted a clean copy to reflect the ticked items to be submitted to contract department DW1 replied that it is not checked by him and he wouldn't know. He then agreed to the following:

97Q: Saya katakan En Jamil, bahawa jabatan kontrak defendan dengan sendirinya tidak akan mengubah tuntutan interim yang dikemukakan oleh plaintif kepadanya selepas pemeriksaan pendahuluan kerana pemeriksaan pendahuluan itu telah dibuat oleh kamu berserta dengan wakil jabatan kontrak, En Zakarian sendiri. Setuju?

A: Ya.

98Q: Jadi jabatan kontrak akan bergantung kepada apa yang kamu dan apa yang En Zakaria telah katakana atau tulis hasil dari pemeriksaan tersebut. Betul?

A: Ya. (Page 141 NOP)

[18] In re-examination as to what he meant in his witness statement the joint inspection not being final and in cross-examination it was final and accurate he explain it meant final and accurate as at time of joint inspection on 1 November 2012. In terms of sequence of the handwriting at the pages for example in B1 491 he would write the percentage he cancelled or he would tick and then he wrote the words against the asterisk, the consultant would sign followed by the plaintiff and the endorsement.

Evidence of DW2

[19] DW2's evidence similarly refuted the amount being claimed by the plaintiff as jointly certified during the joint inspection based on the

requirement for the plaintiff's claim to be first assessed by the defendant at the site prior to submission to contract department. The assessment at site is not any form of certification as the staff at site is only able to do a rough estimate of percentage of work completed by visual examination without the benefit of quantifying against BQ.

[20] Further following the joint inspection and interim progress claim No 12 the plaintiff had submitted interim progress claim No 13. The endorsement was to state the assessment by DW1 is merely the proposed percentage of completion and not finalised and is not a certification of the same. As against the defendant, GOM had certified 49.4% for overall percentage completion, as between the defendant and the plaintiff, the defendant had assessed 50.2% and the plaintiff had claimed 69.2% overall percentage completion. By a comparison of the percentage the joint inspection result was not accepted by GOM.

[21] In cross-examination she disagreed contract department will just follow percentage of preliminary assessment because it is done by its own staff. As to any changes in percentage of work only being done by the defendant if the employer changes the percentage in its certification to the defendant, she replied 'not necessarily'. She disagreed when assessing the plaintiff's interim claim contract department will just compare that interim claim as against the preliminary assessment and the BQ. She is not at site when preliminary assessment is done as the defendant's representative are already there. It was put to her that the defendant's assessment when compared to interim claim No 12 would be a difference of RM1m and these present at joint inspection cannot be off the mark by more than RM1m replied 'they can be wrong'. She agreed payment certificate No 10 in C1 1798 dated 30 October 2012 was prepared by the defendant before preliminary assessment on interim claim No 11 on 1 November 2012 and that it did not follow standard procedure of the defendant in processing claims. She agreed claim No 11 is not in the nature an ordinary interim claim but disagreed since it came at time when it was terminated it is a final claim. She further disagreed claim No 11 is in the nature of a final claim and that is why certificate No 10 is dated and issued before preliminary inspection.

[22] In re-examination on having to follow percentage of preliminary assessment, HQ needs to check if it's in accordance with scope of work and if there is any debit notes. As to being off the mark by RM1m she stated site people looks into visual physical inspection and wouldn't know if payment to third party has been done. Payment certificate No 10 was issued before preliminary assessment as it was at a critical stage and it was to make adjustment to LAD only; no verification was required and it's a contractual

deduction. On the suggestion claim No 11 is final as the plaintiff had been terminated, she said it was not as it was submitted before termination. For her, claim No 13 is the final claim.

Analysis and finding

[23] The plaintiff had submitted its progress claim no 11 dated 25 October 2012 as in B1 491–549. It is not disputed there was a joint inspection on 1 November 2012 which was attended by the defendant through its construction manager who was DW1 and its QS, two of the plaintiff's representatives and two of the defendant's consultants. All present signed on it and from pp 492–515 was a handwritten note by the defendant that 'the proposed percentage is subjected to final approval from client, PPSPPA and consultants'. On the progress claim No 11 the defendant had ticked items which it accepted or otherwise and for items not agreed on, the percentage shown was substituted with the defendant's assessment. Arising from that the plaintiff then says it submitted progress claim No 12 at B1 551–578 which shows value of work done as RM3,576,111.12 and value of materials supplied as RM298,483.25 giving a total of RM3,874,594.37.

[24] The essence of the defendant's resistance to the plaintiff's claim was the handwritten note to the effect the proposed percentage is subject to final approval of the employer which was not forthcoming, there was an increased percentage of work done in progress claim No 12 when compared to progress claim No 11 and there was final progress claim No 13. Both of the defendant's witnesses gave evidence the assessment carried out at the site is not any form of certification as it is only a rough estimate of percentage of work completed and is not meant to be final.

[25] However as acknowledged by DW1 for the assessments prior to progress claim No 11 only he from the defendant would be present as compared to the joint inspection on 1 November 2012 where there were more persons including the defendant's consultants. DW1 in fact agreed 'pemeriksaan ini bersifat seperti tuntutan akhir atau tuntutan penutup selepas penamatan kontrak dengan plaintif' and 'hasil pemeriksaan apa yang kamu tick, apa yang kamu betulkan dan sebagainya mencerminkan tahap kerja dan barangan yang dibekalkan oleh plaintif dengan tepat dan jelas dan teliti'. In re examination DW1 had stated joint inspection was final and accurate as at that date. DW2 too agreed claim No 11 was not an ordinary interim claim.

[26] The evidence thus shows there was something different from the joint inspection arising from progress claim No 11 as compared to the other preliminary assessments in the form of the presence of two from the defendant's side DW1 and QS and two of the defendant's consultants. The fact

of it coming immediately after termination shows it to be intended to value the work done and materials supplied up to the date of termination. Progress claim No 12 which was the outcome of the joint inspection on 1 November 2012 can indeed be used by the plaintiff as the basis for its claim and is final and accurate.

[27] As to proposed percentage having to be approved by the defendant's the employer as per the endorsement, PW1 had agreed if assessment is not accepted by GOM whatever assessment could not be accepted. However there was no direct evidence that the defendant had put in a claim to its the employer on the same percentage of completion as per the joint inspection and that indirect evidence by reliance on the employer's certificate No 25 is misplaced. What the defendant is doing is to compare the percentage to say joint inspection result was not accepted. GOM's assessment of work showed completion of work at 42.88%, the defendant's assessment as per claim No 13 showed 50.19% and the plaintiff's assessment as per claim No 12 showed 69.18%. The points of reference are all different. When put to PW1 based on these percentages the percentage of completion during joint inspection had been rejected by GOM his evidence was 'the defendant didn't even claim' and 'I claim but they may not claim' and that the plaintiff has no opportunity to deal with GOM and the plaintiff only dealt with the defendant.

[28] The differences in percentage between progress claim Nos 11 and 12 have been explained by the asterisk to mean the plaintiff had to justify the percentage claimed.

[29] The contention that progress claim No 12 cannot be relied on as the plaintiff had subsequently issued progress claim No 13 does not hold as PW1 had given cogent reasons for the circumstances under which progress claim No 13 was issued. PW1 had explained claim No 12 had never been superseded by claim No 13 and it came about as the defendant had wanted a discounted price which PW1 said he didn't mind if he was paid. Since there was no payment he would go back to claim No 12 for his claim.

[30] The plaintiff is therefore entitled to be paid based on progress claim No 12.

DELAY

[31] On delay the LA stipulates in cl 4.1 the date of commencement is 17 October 2011, date of completion 16 May 2012 with a contract period of seven months. It is clear that by the time of termination on 31 October 2012 the work had been delayed by about five an half months. The fact of the plaintiff being appointed five weeks before the expiry of the original completion date under the main contract is not relevant to the issue of delay on

the part of the plaintiff. In this regard the defendant has proved there was delay caused by the plaintiff as demonstrated in the minutes of site meetings and site memoranda which are contemporaneous documents which the plaintiff had not shown were untrue. Refer to 248 Q&A at p 65 and 66 NOP; B3 1504 and 1505, 1509 and B1 681 item 6.3 and 687 item 6.1. The defendant was entitled to terminate pursuant to cl 25 of the contract. Its counterclaim arising from termination will be dealt with separately. However the fact of delay does not have an effect on the plaintiff's claim premised on progress claim No 12 which is for work done and materials supplied as at the date of termination.

[32] There was no EOT granted by the defendant and the letters in question do not indicate that. Paragraph 3 of letter dated 24 July 2012 in B1 403 clearly states:

> Based on your request for extension of time letter from us in order for you to be permitted by your bank to use the bank facilities, we have been accommodating to your request. This process shall not in anyway affect the progress of work at the site.

It is clear this letter is to facilitate the plaintiff's banking purpose. The letter dated 19 October 2012 in B1 441 was to put the plaintiff on notice to complete its work.

[33] As per both these letters DW2 had in re examination stated they are not EOT but a chance for the plaintiff to rectify its failure to complete the work (p 435 NOP). In this regard DW2 is better placed to give evidence on contract matters on EOT as opposed to DW1 who was at site.

COUNTERCLAIM

[34] The defendant's counterclaim is for the cost of completion of remaining works and LAD.

[35] Particulars of the defendant's costs in completing the work are as shown in pp 46–47 of Bundle A. According to DW2 the total value of work done of RM3,671,426.75 based on progress claim No 13 did not take into account excessive claims, direct payments to sub contractors and difference in valuation. Excessive claims are those where the plaintiff claimed more than the contracted agreed price. Difference in valuation relate to percentage of work done claimed by the plaintiff where it was not accepted by consultant or the employer and there is a thus a difference in valuation claimed by the plaintiff compared to the amount recognised by the defendant. Annexure B to WSD2 at pp 119–134 shows the difference in valuation. Annexure C to the witness statement WSD2 at p 142 shows if these three items are deducted this would bring the value of work done to RM2,811,131.95. Q&A 17 of WSD2 explains this.

Deduction for excessive claims

[36] With regard to excessive claims as shown in appendix C to WSD2, the plaintiff had conceded to all the items except the item 150mm diameter ductile iron pipe. The defendant had not proved this, more so when the sum for this item had been agreed in the joint inspection as per B1 520, item 31, namely 'ductile iron pipes fittings' at '75% value of delivery of RM96,520.05'. The plaintiff counsel in his written submission dated 29 October 2015 at para J4 p 173 agreed the defendant is entitled to deduct a sum of RM158,122.70.

Direct payments

[37] These direct payments were payments made directly to the plaintiff's subcontractors and consist of payment of RM295,450 for residual suspended solid removal system to Envilab Sdn Bhd, RM172,992 for electrical system cabling and general work to DP Controls Sdn Bhd and RM36,950 for water reticulation work to Pakatan PSC Sdn Bhd. These direct payments amount to RM505,392. Although the LA does not allow this, this was an occasion of mitigation. Be that as it may the defendant had not proved this payment in the form of invoices, payment vouchers and/or receipts.

Difference in valuation

[38] The difference in valuation is shown by DW2 in Annexure B to WSD pp 119–134. In the course of the trial, the parties had made concessions to some of the items comprising this difference in valuation (p 291 NOP). The defendant had dropped several items from the list of difference in valuation. The plaintiff had conceded and allowed the defendant to deduct the sum of RM816 for the item 'General building lighting and power'. As a result only seven items remain as items of difference in valuation.

Actuated bellmouth stopper

[39] No evidence was adduced by the defendant to support its allegation that this item had not been properly installed, either by putting it to PW1 or to DW1. DW2 has no personal knowledge as she said she had been informed by DW1. Given that the defendant had claimed 100% for this item from the the employer as in B4 2497 item R the plaintiff's claim for 75% is fair and reasonable. This is also consistent with the joint inspection where the defendant had agreed to allow 75% for this item, as in B1 495.

Filterate returns pumps

[40] According to the defendant these pumps were not at site. DW2 stated it was reported by DW1 that this pump was not at the site during the joint

inspection and neither could she find it in the photograph in C4 3619–3616. However the authenticity of this had been challenged and disputed by the plaintiff. As against this at B1 520 item 27 has listed filterate return pumps. There is thus no reason for the defendant to reduce the plaintiff's claim to 0%.

150mm diameter ductile iron pipe

[41] DW2 had stated the defendant had claimed 100% from the employer as in B4 2536 item D. No evidence was led by the defendant to show how it arrived at the valuation of 50% for this item. Given that the defendant had claimed and was paid 100% for this item by the employer, the plaintiff's claim of 75% is fair and reasonable.

Aeration tank

[42] According to DW2 excavation work was not necessary as another subcontractor had done that work and that backfilling was the work required instead. However she has no personal knowledge on this. This should be been dealt with by DW1 and nothing was ever put to PW1 on this issue. Accordingly the defendant ought not to be allowed to deduct for this item.

Indoor and outdoor distribution box

[43] According to DW2 this item had been delivered by the plaintiff to the site prior to termination. The difference in valuation arose because the defendant had paid this amount directly to the plaintiff's supplier DP Control Sdn Bhd. There is no evidence to show that this sum had been paid directly to DP control.

Electrical ductwork and pit

[44] This claim was reduced to 0% because 'The employer assessed the work as 0% and the defendant had to reject the plaintiff's claim accordingly ...'. However it was shown no claim had been put to the employer and there could therefore be no rejection.

Preliminaries

[45] In arriving at the defendant valuation of the preliminaries, DW2 had used the formula as stated in the fifth column at p 134 of WSD2 under 'Basis of Differences' namely:

$$\text{"}\frac{\text{Work done (without preliminaries) x Preliminaries Sum}}{\text{Sub-Contract Sum (without preliminaries)}}\text{"}$$

In cross-examination DW2 had given the actual figures which she had used in that formula namely (pp 348–349 NOP).

$$\frac{\text{RM2,689,689.62 x RM189,650.00}}{\text{RM5,410,350.00}} = \text{RM94,282.19}$$

[46] DW2 agreed that the only variable in the aforesaid formula would be the first component ie 'Work done (without preliminaries)' and that the other two components of the said formula were fixed sums and would not change. As this court has accepted the value of the works done and materials supplied as per the plaintiff's claim No 12, then the preliminaries for the purpose of p 134 Annexure B would be as follows:

Value of works done/material

Supplied by the plaintiff	:	RM3,874,594.37
Less: Variation order	:	RM(27,160)
Less: Preliminaries in claim No 12	:	RM(148,339.60)

$$\frac{\text{RM3,699,094.77 x RM189,650.00}}{\text{RM5,410,350.00}} = \text{RM129,665.05}$$

The difference in valuation for purpose of preliminaries at p 134 Annexure B would only be:

$$\text{RM146,293.38} - \text{RM129,665.06} = \text{RM16,628.33.}$$

Conclusion on difference in valuation

[47] The defendant is only allowed to deduct the item 'General building lighting and power' as conceded by the plaintiff of RM816 and the item preliminaries based on claim No 12 of RM16,628.33.

COSTS OF COMPLETION

[48] On the costs of completion DW2 had calculated it to be RM3,166,822.17 and the list of debit notes and supporting documents are as shown in annexure F to WSD2. From the value of works the defendant says has been completed by the plaintiff and deducting the four items in p 46 of Bundle A (retention sum, payment to the plaintiff, debit note and payment by letter of credit) there would be a credit of RM272,799,69 to the plaintiff. From the costs of completion of RM3,166,822.17 the particulars and costs as shown in Bundle A 47 minus the value of remaining work not completed of RM2,800,028.19 ('Bundle A 46'), the differential cost of completion is

RM366,793.98. This makes D's counterclaim to be RM93,944.29 as seen in Bundle A 47. The differential cost comprise the following:

Works carried out on behalf of:	
The plaintiff due to the plaintiff's	
Defaults	RM31,930
Direct payment by the defendan to the plaintiff subcontractor/supplier	RM505,392
Rectification works carried out by the defendant	RM62,760.35
Cost in completing the remaining works as at to date	RM2,509,194.65
Additional costs	RM57,545.17

Work carried out on behalf of the plaintiff due to the plaintiff's default

[49] This item relates to CO2 or fire fighting system for which the defendant has raised a debit note ('DN') at C2 1999. This is not within the plaintiff's scope of work as it is not to be found in LA and the specification.

Direct payment

[50] With regard to the item on direct payment to subcontractors this is a double deduction as the defendant had already deducted this item when arriving at its figure of value of work done as clearly shown in WSD2 p 142.

Rectification work

[51] This work relates to DN No 7 at C2 2045 on aeration tank. In this regard the defendant has failed to prove that the aeration tank was defective in that it was leaking and thus required rectification; failed to show that the plaintiff was given a notice to rectify that allegedly occurred during the defect liability period; and did not prove that it actually paid/incurred the stated amount.

Additional costs

[52] This arises out of DN Nos 21–29 in C3. DW2 confirmed that DN Nos 21, 22, 24, 26, 27 and 28 were for claims in respect of general workers and hardware and related to works such as removing wild plants at the fencing perimeter, re-painting rusted control panel, grass cutting, cleaning of handrailings and cleaning of toilets. All of these six DN for general workers and hardware are for works done some 19–23 months after the termination of the plaintiff's contract. From the nature of these works, it appears these are maintenance work and therefore are not within the plaintiff's scope of works.

[53] There were three DN relating to equipment. DN No 23 at C3 3070 relates to the supply and installation of four units M-system. There was no proof this was within the plaintiff's scope of work or that the defendant had purchased and paid for these units. DN No 27 at C3 3126 carries the same description as in DN No 23. DN No 25 relates to the Tsurumi Submersible Pump. According to the defendant this item fell under item E filter feed pump in the BQ at p 37 Bundle A and not item G filtrate return pump at p 37 as claimed by the plaintiff. However DW2 evidence was based on what DW1 told her and the drawing which was not produced. There was no evidence to support DW2's assertion the pump installed by the plaintiff kept breaking down. Further the defendant had used as a replacement, a pump with a higher specification of '42m*3*/hour' than that stipulated in the specification attached to the BQ of '10m*3*/hour' (the plaintiff's item) or '26m*3*/hour' (the defendant's item).

[54] DN No 29 at C3 3231 relates to Allweiller German high pressure pumps. The defendant failed to prove that the Allweiller pumps installed by the plaintiff were defective and failed to show that it actually incurred the amount debited.

Costs of completion

[55] Annexure F to WSD2 marked as P1 details the breakdown of costs of completion.

Items 1–4

[56] These items appear in B2 857 and the total sum had already been deducted from the defendant's value of work as at A 46. As such this amount cannot be added to the cost of completion.

Item 5

[57] This arises from DN No 6 at C2 2026 relates to item Q in Bill 1 MEICA works and the rationalised rate is RM465,000 consisting of five units of surface aerator at RM93,000 each. No claim had been made by the plaintiff for this item. There is no quotation from the supplier to show the specifications of the surface aerator supplied or the price at which the surface aerators would be supplied; and no delivery order, invoice or proof of payment to the supplier of this amount claimed. DW2 had also agreed that the rationalised amount of RM93,000 in the BQ also covered the cost of installation of the surface aerator. However a sum of RM53,000 was claimed for installation. The total sum of RM713,300 for the supply and installation of those five aerators is a 53% increase than the price rationalised in the BQ. The defendant has failed to justify this increase. There is another item for supply of instrument in respect

of PO issued to IPSH Sdn Bhd as per C2 2038–2044. The M system was damaged due to electrical and improper installation and had to be replaced. There was however no proof this damage was caused by the plaintiff.

Item 6

[58] This relates to DN No 8 at C2 2050. The quotation for the ductile iron pipes issued by the third party was dated 2 January 2013. The defendant's purchase order was dated 30 January 2013. The third party's invoice was dated 11 March 2013. Prior to this the employer had already certified 100% for the ductile pipe items as required under the main contract as shown in B7 bill two items B to E. There was no reason why in January–March 2013, the defendant was purchasing more ductile iron pipes.

Item 7

[59] This item relates to the air-conditioning units. The plaintiff did not make any claim for the supply of the air-con units as confirmed by DW2. No evidence was led to show that this item had cost more than what was rationalised in the BQ with the plaintiff. Thus there is no difference or additional cost arising out of this item.

Item 8

[60] This item arises out of DN No 10 at C2 2067 and relates to the remaining surface drain works. The description of the drainage works is at C2 2073 and the sum being charged is RM203,370. DW2 had confirmed that these works are the same as items F-K 'Drainage' Bill 5 in the BQ at B 63 and that the total rationalised rate for these items in the BQ is RM178,466. A perusal of items F–K of the BQ will show that item A at p 2073 is not within the plaintiff's scope of works as the BQ makes no mention of drainage of the depth of between 450mm–1000mm.

Item 9

[61] This item arises out of DN No 11 at C2 2074 and relates to water reticulation work. The work falls under item A-C Bill 5 of the BQ at B 63 and the total rationalised rate for these works is RM75,200. By paying RM36,950 to Pakatan PSC for these works for and on behalf of the plaintiff, the defendant had accepted and certified this sum of RM36,950 as the amount due to the plaintiff for works already done. Out of the rationalised sum of RM75,200 the defendant had accepted and certified RM36,950 which is almost 50% leaving a balance of RM38,250 for the remaining works. Yet the defendant is now charging RM114,930 which is a three fold increase compared to the balance of RM38,250 under the rationalised rates. This increase has not been explained.

Item 10

[62] This item arises out of DN No 12 at C2 2111 and relates to the remaining architectural and building works. There are three items described. On the first item totaling RM73,302, the breakdown for this sum is at C2 2122. For the guard house a sum of RM6,900 is being claimed. As agreed to by DW2, since the rationalised rate in the BQ is RM18,148, this would still be within the contract sum. Thus, there is no difference/additional cost arising out of the guard house claim here. The second item at p 2122 is in relation to the control building for the sum of RM44,652 The works comprised in this sum of RM44,652 are as shown at pp 2125–2127 and are exactly the same as in final claim No 13 at pp 3264–3265. DW2 agreed that the plaintiff did not claim for any of these works. The rationalised rate of these works as shown in final claim No 13 at pp 3264–3265 is RM73,006. Given that no claim had been made by the plaintiff for these works, even if the defendant had incurred the sum of RM44,652 for the control building it would still be within the contract BQ sum. There is no difference or additional cost arising out of the control building. The same goes for the third item at p 2122 TNB Compact substation for the sum of RM21,750. As agreed to by DW2, the rationalised rate in the BQ is RM55,000. Even if the defendant incurred this sum, it would still be within the BQ contract sum.

[63] The second item is for additional works at control building, storage shed, drying bed, fencing and gate etc for the sum of RM23,704. The breakdown for the said sum RM23,704 is at p 2140. For sub-item B1.0 at p 2140, DW2 agreed it was within the BQ amount. Thus, there is no difference/additional cost. Sub-item B2.0 at p 2140 reads as 'Replacing defective metal deck at P55'. Under cross-examination DW2 agreed that there was no document in the bundles to prove that these were defective works. DW2 also agreed on the assumption it was defective, there was no notice given to the plaintiff to rectify it. As such this item B2.0 ought not to be allowed. For item D 'Turfing Works' at RM3,000, this was within the BQ sum. Thus there was no difference/additional cost to complete these works.

Item 11

[64] This item arises out of DN No 13 at C2 2150 and relates to electrical or MEICA works. At pp 2163–2165 is the BQ showing the rates agreed between the defendant and the supplier/subcontractor DP Controls Sdn Bhd. DW2 was referred specifically to p 2163 wherein the total for works K-P therein is RM615,000 whereas the rationalised rates for those same works in the BQ with the plaintiff is RM468,020. Hence, there is an increase of RM146,980. When asked to justify this difference, DW2 stated it was based on the same quotation which DP controls had given but was not produced. DW2 would not know

why if the plaintiff itself was only entitled to a lump sum of RM468,000 for the works under items K-P, it would have agreed to pay DP controls the sum of RM615,000 for those same works. The defendant has failed to justify the said increase of RM146,980 to DP controls.

Item 12

[65] This item arises out of the DN No 14 at C2 2195 and relates to electromagnetic flow water. DW2 agreed that only one electromagnetic flowmeter was to be supplied and based on DN 6 at p 2024 item 3 and the defendant's purchase order at p 2040 item 3 therein, an electromagnetic flowmeter had already been supplied. DW2 was unable to answer why the same meter was again being supplied. In absence of an explanation there can be no claim.

Item 13

[66] This item arises out of the defendant's DN No 15 at C2 2197 and relates to TNB metering work in the sum of RM12,500. DW2 agreed that even if the defendant did incur this sum it would still be within the subcontract BQ amount. Thus, there is no difference/additional cost arising therefrom.

Item 14

[67] This item arises out of DN No 16 at C2 2202 and relates to the DAF Plant for the sum of RM311,000. As confirmed by DW2 this sum of is the same as the rationalised rate in item D of the BQ at B 37. There is no thus difference/additional cost.

Item 15

[68] This item arises out of DN No 17 at C2 2216 and relates to water reticulation work for the sum of RM68,547.60. Out of this an amount of RM36,950 is direct payment to the plaintiff's supplier Pakatan PSC. By adding the whole of this sum of RM68,547.90 (which includes the direct payment of RM36,950 to Pakatan PSC) as part of the cost of RM2,509.194.65 the defendant has in effect added the sum of RM36,950 twice in arriving at the total cost of RM3,166,822.17. The first time is in the total direct payments RM505,392 and the second time is in the cost of RM2,509,194.65 both at A 47. Further, the defendant has failed to show whether the completion of the remaining water reticulation works by Pakatan PSC had resulted in additional costs for the same work which were required of the plaintiff under the contract.

Item 16

[69] This item arises out of DN No 18 C2 2237 and relates to the testing and commissioning of the instrumentation and equipment. The sum involved is RM203,300. According to the plaintiff the rationalised rate of RM150,000 for testing and commissioning as shown in item E of the BQ at B 36 includes the factory acceptance test at the suppliers factory as and when the items are supplied and is not merely confined to testing and commissioning at the worksite. There was no explanation or justification for the difference and increase in the amount claimed when compared to rationalised rate and the defendant is not allowed to claim for the difference or additional costs in respect of this item.

Item 17

[70] This arises out of DN No 19 at p C2 2246. This item concerns the supply and laying of pre-mix. The breakdown of this sum is at item D. There was no claim by the plaintiff and the sum shown is within the BQ lump sum contract amount. There is thus no difference/additional cost arising out of this item.

Item 18

[71] This arises out of DN No 20 at C2 2266. The first sub-item is supply and install ductile iron pipe. It was DW2's evidence that this was installation only. It was agreed when the employer had certified the full amount of the quantity this would include the installation amount. This would in essence be a double charge.

[72] The second sub-item is to install and maintain the aeration tank, NaOH dosing pump and and the FRS pump for RM18,000. DW2 admitted that she did not know which of these equipment were installed and which were maintained and following therefrom she was in no position to tell how much out of the said sum of RM18,000 was for maintenance and how much for installation. In any event it is not the plaintiff's responsibility to maintain.

[73] The third sub-item is for the supply and installation of the galvanised iron mild steel maintenance platform for the sum of RM5,000. DW2 agreed that this sub-item came under the residual suspended solid removal system platform and the plaintiff had already completed the work. There is thus no difference or increase on cost to complete this work.

[74] The fourth sub-item relates to supply and installation of stop gate at sludge drying bed. DW2 agreed that BQ does not state this item but was a lump sum mentioned in the drawing. The drawing was not produced and this claim is not proved.

[75] The fifth sub-item is for the supply and installation of the fencing and gate in the sum of RM17,800.00 It was DW2's evidence the gate was supplied and hence the 95% certification. The plaintiff had yet to supply and install barb wire on top of the gate. There was no breakdown how much was charged for fencing and for the gate.

Administration fee of 3%

[76] DW2 agreed that this administration 3% fee is not stated or provided for in the LA and was the defendant's company policy. Therefore it is not a contractually agreed term that the defendant may charge such a fee. There was no proof that the plaintiff had agreed and accepted the imposition of such a fee.

LAD

[77] As stated by DW2 in WSD2A as per contract, if the plaintiff fails to complete the work in accordance with date of completion, it is liable to pay RM4,000 per day. As of date of termination there were 169 days of delay calculated from 16 May 2012–31 October 2012 making it RM676,000 as LAD. The defendant is only claiming RM560,000 as LAD is limited to 10% of contract sum.

[78] In cross-examination this was the following evidence:

> 205Q: ... would you agree with me that the LAD of RM560,000 which is imposed by the defendant, is arrived at as a matter of mathematical calculation. Meaning RM4,000 per day times the number of days delayed subject to maximum of 10% of the contract sum. Correct?
>
> A: Correct.
>
> 207Q: But I am saying that this RM560,000 because you have agreed it is arrived at as a matter of mathematical calculation, so this RM560,000 is actually not quantum or the value of the actual loss sustained by the defendant as a result of alleged delay by the plaintiff. Correct?
>
> A: Correct. (Page 244 NOP)
>
> 210Q: So you are saying it would be the cost overrun plus the LAD imposed by the employer. As far as the cost overrun that means the amount the Defendant had to incur to complete the unfinished the plaintiff's work, that is already encompassed and included in part of the counterclaim in this suit. Correct?
>
> A: Correct. (page 245 NOP)

[79] In *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 it was stated at p 823 (MLJ); p 375 (CLJ) that:

> Held:
>
> ...
>
> [4] Where there is inherently any actual loss or damage from the evidence or the nature of the claim, and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damages, will result in the refusal of the court to award such damages, despite the words 'whether or not actual damage was proved to have been caused thereby' in s 75 of the Contracts Act.
>
> [5] In the present case, the evidence clearly shows some actual loss, damages for which could be assessed by settled rules, as there was evidence that at the material time the appellant was already using the respondent's medical equipment. This is therefore an example where damages could be proved by settled rules, but evidence has not somehow been brought to prove damages for the said actual loss, so as to enable the court to award at least some damage as compensation for loss of use of the said medical equipment. The damages have not been proved, no compensation could be awarded in this respect.

[80] Going by DW2's evidence, LAD of RM560,000 is not the defendant's actual loss and the actual loss suffered by the defendant due to the plaintiff's delay was the LAD imposed by the employer on the defendant plus the cost of completing the plaintiff's unfinished works. This therefore means actual loss suffered by the defendant is capable of being ascertained and proved by way of settled rules. On the facts of the case the claim for RM560,000 is not the actual loss suffered by the defendant. There was further no proof of any LAD imposed on the defendant by its the employer.

CONCLUSION

[81] Accordingly the plaintiff is allowed a claim of RM1,160,695 after deducting the four items of retention sum, payment by the defendant and by letter of credit and various DN, difference in valuation of RM17,444.33 and excess claim of RM158,122.70 with interest of 5% from 22 November 2012. The defendant's counterclaim is dismissed. Costs to the plaintiff.

The plaintiff's claim of RM1,160,695 allowed with interest and costs and the defendant's counterclaim dismissed.

Reported by Kohila Nesan